



Comptroller General
of the United States

Washington, D.C. 20548

Shimamura

Decision

Matter of: Grove Roofing, Inc.
Date: B-240743; B-240744; B-240745; B-241090
File: December 10, 1990

William E. Bradney for the protester.
David Fletcher for Fletcher-Hardee Corporation, and Ronald U. Davis for Tri-State Design Construction Co., Inc., interested parties.
Paul M. Fisher, Esq., Department of the Navy, for the agency.
Amy M. Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency decision to set aside a solicitation for small disadvantaged business (SDB) concerns is proper where the contracting officer determines that there is a reasonable expectation of bids from at least two responsible SDB concerns and that award can be made at a price not exceeding the fair market price by more than 10 percent.
2. Under the Small Business Competitiveness Demonstration Act of 1988, 15 U.S.C. § 644 note (1988), setting aside procurements in four designated industry groups for small businesses is prohibited.

DECISION

Grove Roofing, Inc. protests the Department of the Navy, Naval Facilities Engineering Command's decisions to set aside the following four procurements for small disadvantaged business (SDB) concerns: (1) invitation for bids (IFB) No. N62472-90-B-4716 (-4716), Roof Repairs Maintenance Construction at the Philadelphia Naval complex; (2) IFB No. N62472-89-B-0425 (-0425), Replace Roof, Building No. 8, Naval Aviation Supply Office (ASO), Philadelphia, Pennsylvania; (3) IFB No. N62472-89-B-0426 (-0426), Repair Roof, Building No. 15, ASO; and (4) IFB No. N62472-89-B-4538 (-4538), Roof Repairs, Building 974, Philadelphia Naval Shipyard. Grove contends that the SDB set-asides discriminate against small roofing firms and violate procurement regulations. The protester requests that the solicitations be

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canceled and that the requirements be recompeted as small business set-asides.

We deny the protests.

The Navy advertised the four roofing procurements in the Commerce Business Daily (CBD). Each of the CBD notices advised potential bidders that the proposed contract was being considered for 100 percent set-aside for SDB concerns, and that SDB concerns should indicate interest in the acquisition by providing the agency with evidence of capability to perform and a positive statement of eligibility as a socially and economically disadvantaged business concern. The CBD notices also advised that if adequate interest was not shown by SDB concerns, the solicitation would be issued on an unrestricted basis with no SDB evaluation preference.

In response to the CBD notices, three SDB concerns indicated an interest in IFB -4716; four SDB concerns showed interest in IFB -0425; three SDB concerns indicated interest in IFB -0426; and three SDB concerns showed interest in IFB -4538. Based on an investigation of the SDB concerns responding to the CBD announcements, the designated contracting officers, after consulting with the Small and Disadvantaged Business Utilization Specialist (SADBUS), determined that each of the procurements should be set aside for SDB concerns.

The Department of Defense (DOD) established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (1988), which left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the Act's stated objective of awarding 5 percent of the dollar value of DOD's contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125. Under the DOD implementation of the Act, the entire amount of an individual acquisition is required to be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a) (DAC 88-13); see Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

Grove contends that the Navy improperly set aside the four roofing contracts for SDB concerns because the agency could not have expected bids from two responsible SDB concerns because many of the firms on the prospective bidders' list are not in the roofing business. Grove also contends that the bid

results indicate that the SDB set-aside was improper because the bid prices obtained from these firms were unreasonable.

The record indicates that in response to the CBD notices, the agency received expressions of interest from at least three SDB concerns for each of the four procurements. The contracting officers obtained information on the interested SDB concerns' bonding and financial capabilities, and determined that there were at least two interested responsible SDB concerns for each procurement. Further, the contracting officers attest that based on an investigation of the acquisition history for similar services, they determined that award of the four contracts would be made at a price not exceeding the fair market price by more than 10 percent. Since the requirements of DFARS section 219.502-72 were met in each of the four procurements, the contracting officers were required by DFARS to set aside the contracts exclusively for SDB concerns. Kato Corp., 69 Comp. Gen. 374, supra.


Grove alleges that in the Philadelphia area the Navy discriminates against small roofing firms, such as Grove, because only roofing contracts, as opposed to all construction contracts, are set aside for SDB concerns. However, the cognizant Navy official, the SADBUS, attests that the Northern Division of the Naval Facilities Engineering Command has in the past and currently sets aside procurements for exclusive SDB participation in virtually every existing category of construction, e.g., structural, mechanical and electrical work and whole building repair and/or rehabilitation. This official has provided a computer printout which indicates that for the first 2 months of fiscal year 1990, of the 16 construction industry contracts set aside for SDB concerns, only 2 were roofing contracts. The other contracts were for electrical, mechanical, general contracting, painting, excavation, plumbing and heating and water, sewer or pipeline work. The protester has provided no evidence in support of its allegation that the Navy SDB set-aside practices are improperly discriminatory.

Grove contends that the bid prices received in response to IFBs -0425, -0426, and -4716 are unreasonable. Under DFARS § 219.506(a), an SDB set-aside may only be withdrawn if the low responsible offer exceeds the fair market price by more than 10 percent. See Americorp, B-231644, Oct. 6, 1988, 88-2 CPD ¶ 331. Here, the agency states, and the record confirms, that the bid prices received in response to these IFBs were reasonable, since on each procurement, the agency received at least one SDB bid that was within 10 percent of the

government's original or revised estimate.^{1/} Since the protester has provided no evidence in support of its allegation that the bid prices under the three solicitations were unreasonable, we have no basis to question the agency's determination of price reasonableness.

The protester finally contends that the requirements should be satisfied under solicitations set aside for small businesses. However, under the Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988), the agency is prohibited from setting aside roofing contracts for small businesses. See DFARS § 219.1070-1(c)(3) (DAC 88-8).

The protests are denied.


James F. Hinchman
General Counsel

^{1/} The agency states that the government estimates for IFBs -0425 and -0426 failed to consider certain pricing information and were revised. See Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189, in which a protest of the cancellation of a solicitation set aside for SDB concerns for price unreasonableness was sustained because the government estimate failed to consider certain pricing information.